

FILED

JUN 21 2005

UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA

In Re

Chapter 11 Proceedings

SWTV PRODUCTION SERVICES,
INC.,

Case No. BR-02-09489-PHX-CGC

Debtor.

SWTV PRODUCTION SERVICES,
INC., an Arizona corporation,

Adversary No. 2-03-01092

Plaintiff,

LAWRENCE E. MEYERS and DAWN
BURNSTYN-MEYERS, husband and
wife; MARK JOHNSON and JANE DOE
JOHNSON, husband and wife;
MEYERS ENTERPRISES LIMITED
PARTNERSHIP, an Arizona limited
partnership,

Defendants.

MARK JOHNSON, an individual, and
LAWRENCE E. MEYERS and
MEYERS ENTERPRISES LIMITED
PARTNERSHIP,

UNDER ADVISEMENT DECISION
RE: MOTION FOR PARTIAL
SUMMARY JUDGMENT

Plaintiffs/Counterclaimants,

v.

SWTV PRODUCTION SERVICES,
INC., an Arizona corporation,

Counterdefendant.

LAWRENCE E. MEYERS and
MEYERS ENTERPRISES LIMITED
PARTNERSHIP,

Crossclaim Plaintiff,

1)
2 v.)
3)
4 GREYSTONE CDT ASSOCIATES,)
5 LLC; and SCOTT BARKER and JANE)
6 DOE BARKER,)
7)
8 Crossclaim Defendants.)
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I. Introduction

Plaintiff SWTV Production Services ("Debtor") seeks summary judgment on two of its claims against Defendants Lawrence and Dawn Meyers and the Meyers Enterprises Limited Partnership ("Defendants"): Count Two for Unjust Enrichment/Equitable Lien/Constructive Trust and Count Four for Declaratory Judgment. After a hearing on May 10, 2005, the matter was taken under advisement. For the following reasons, summary judgment is denied.

II. Facts

What happened, when, where and for how much is largely undisputed. The disagreement lies in how the parties characterize their relationship and the various transactions. Were these transactions all part of an above-the-board loan and lease between Debtor and Defendants or did Defendants take advantage of their status as shareholders and members of the board of directors to acquire wealth at Debtor's expense? The difficulty, as will be discussed in a moment, is deciding this on summary judgment.

In June, 1997, Defendant Lawrence Meyers purchased certain real property in Tempe, Arizona, which included various improvements, furniture, fixtures, equipment and personal property. At the time, Mr. Meyers was the chief executive officer and, he claims, sole member of the board of directors and shareholder of Debtor SWTV.

One hundred and seventeen thousand dollars (\$117,000) of SWTV's funds were used to make the down payment on the purchase of the property. Defendant Meyers took out a separate loan from Bank of America ("BofA Loan") for approximately \$730,000 to fund the remainder of the purchase. The BofA Loan was secured by a deed of trust in its favor. Debtor SWTV guaranteed this loan. The property was titled in Defendants Lawrence and Dawn Meyers names and then leased back to Debtor SWTV as office/warehouse space under a lease agreement beginning June 21, 1997.

1 Under the lease's terms, SWTV was responsible for all real property and lease taxes, utilities and
2 maintenance expenses. The base monthly rent, excluding taxes, utilities and maintenance, was
3 approximately \$9,165. Debtor subordinated the lease agreement to the deed of trust securing the
4 \$730,000 BofA Loan. In addition, during 1997, Debtor made and paid for various improvements
5 to the property totaling approximately \$74,000.

6 In June, 1999, Defendants Meyers quit-claimed their interest in the property to Defendant
7 Meyers Limited Partnership ("Partnership") and assigned their interest in the lease to the Partnership.
8 In the same year, Defendant Meyers solicited additional investment in Debtor through Greystone
9 Capital, an investment initially booked as debt but which Defendants argue Greystone represented
10 would be converted to equity at some time.

11 Subsequently, in September, 2000, the Partnership refinanced the original \$730,354 BofA
12 Loan with an \$800,000 loan from Wells Fargo ("Wells Fargo Loan"). At the same time, Defendant
13 Meyers executed a Commercial Guaranty ("Guaranty") obligating SWTV to guarantee repayment
14 of the Wells Fargo Loan by the Partnership. The SWTV lease was then again subordinated to the
15 deed of trust now securing the Wells Fargo Loan. Around this same time, SWTV made further
16 improvements to the property for approximately \$102,000. Once the Wells Fargo Loan closed,
17 SWTV was repaid approximately \$82,000 for improvements it had previously financed. According
18 to Debtor, between the monthly lease payments paid by SWTV and the monthly finance payments
19 on the \$800,000 Wells Fargo Loan, Defendants received approximately \$1,387.22 a month in profit.

20 In late 2001, Debtor's books showed approximately \$7,000,000 in demand notes owing
21 Greystone, which Defendants contend caused Wells Fargo to elect to withdraw the operating line
22 of credit it had extended Debtor. When this happened, Debtor needed to find a new source of capital
23 to repay Wells Fargo and operate. Debtor negotiated two loans – one for \$2 million with CIT and
24 one for \$1.5 million with Compass Bank. Both institutions required personal guarantees from
25 Defendants Meyers. Defendants agreed to execute personal guarantees but only if Debtor would
26 forgive the outstanding shareholder loans once Debtor actually used in excess of \$300,000 on the
27 new line of credit from Compass Bank.

28 In Debtor's view, these transactions were fraudulent, done without proper corporate approval

1 and forced upon SWTV by Defendant Meyers' as CEO, majority shareholder and board member
2 solely to enrich Defendants at Debtor's expense. As a result of Defendants' unjust enrichment,
3 Debtor argues it is entitled to a constructive trust and/or equitable lien in the property. According
4 to Debtor, a constructive trust may be imposed in connection with a breach of fiduciary duty where
5 the fiduciary has acquired a benefit from the breach and an equitable lien may be imposed to prevent
6 an individual from retaining a property interest acquired at the expense of another.

7 Defendants counter that the \$117,000 down payment was a valid shareholder loan made in
8 the normal course of business and that the lease to Debtor was at market rate with the normal
9 attendant obligations of a lessee for taxes, utilities, and improvements. The subsequent forgiveness
10 of this loan was further supported by sufficient consideration.

11 **III. Analysis**

12 To prove unjust enrichment in Arizona, Debtor must show that it (1) conferred a benefit upon
13 Defendants; (2) that the benefit was at SWTV's expense; and (3) that it would be unjust to allow
14 Defendants to keep the benefit conferred. *See Murdock-Bryant Const., Inc. V. Pearson*, 146 Ariz.
15 48, 53, 703 P.2d 1197, 1202 (1985). More precisely, when making an unjust enrichment claim, the
16 plaintiff must establish the "absence of justification for the enrichment and the impoverishment and
17 . . . the absence of a legal remedy." *Trustmark Ins. Co. v. Bank One, Arizona, NA*, 202 Ariz. 535,
18 48 P.3d 485 (App. 2002); *Community Guardian Bank v. Hamlin*, 182 Ariz. 627, 898 P.2d 1005
19 (App. 1995). It is not enough that a benefit was conferred at another's expense: there must be
20 something unjust or inequitable about the enrichment and there must be no other legal remedy
21 available than a claim for unjust enrichment. "The mere fact that one party confers a benefit on
22 another, however, is not of itself sufficient to require the other to make restitution. Retention of the
23 benefit must be unjust." *Pyeatte v. Pyeatte*, 135 Ariz. 346, 661 P.2d 196 (App. 1983). Based on the
24 record provided, the Court cannot grant Debtor summary judgment.

25 While the record supports Debtor's argument that its funds enriched or benefitted Defendants
26 by purchasing and improving the property for Defendants at allegedly no cost to them (by making
27 monthly lease payments that resulted in additional earnings to Defendants and a reduction of the
28 principal balance owing on the bank loans, by guaranteeing both the original loan and the refinance

1 with Wells Fargo, and by paying all real estate taxes, utilities and maintenance costs), there are
2 disputed issues of material fact as to whether the benefits were unjustified or inequitable.

3 According to Defendants, and as supported by various exhibits, the original payment by
4 Debtor of the \$117,000 down payment was treated as a shareholder loan scheduled and carried
5 on Debtor's books and reflected in independently audited financial statements. While admittedly
6 no written loan agreement has been provided (and it appears there is none), there is sufficient
7 evidence on summary judgment to create a question of fact as to whether this transaction was in
8 fact a loan or intended to be a loan (even if corporate formalities were not followed) and, if so,
9 what were its terms and was there a breach. In addition, no one disputes that the \$117,000
10 deposit was only that – a deposit, and that Defendant Meyers took out an additional \$740,000
11 loan to fund the remaining purchase price, further detracting from Debtor's argument that it was
12 made to bear the entire financial brunt of purchasing this property to Defendants' sole benefit.
13

14 Further, even if we assume Debtor is correct and that the shareholder loan was not
15 entered into following proper corporate procedures, and therefore there is no valid shareholder
16 loan, this does not necessarily give rise only to an unjust enrichment claim. In fact, Debtor has
17 sued for breach of fiduciary duty and breach of contract and couches much of its motion and
18 reply in terms of such claims.¹ If either of these claims were to be successful, the claim for
19 unjust enrichment would not be available to Debtor: Debtor may be placing the cart before the
20 horse here. Further, a failure to follow corporate procedures does not lead this Court
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24 ¹The Arizona Supreme Court has in fact held that if there is a specific contract that governs the
25 relationship of the parties, the doctrine of unjust enrichment has no application. *Brooks v. Valley*
26 *Nat'l Bank*, 113 Ariz. 169, 174, 548 P.2d 1166, 1171 (1976); *see also Johnson v. American Nat'l*
27 *Ins. Co.*, 126 Ariz. 613 P.2d 1275 (App. 1980) (quoting a Pennsylvania case: "the quasi-contractual
28 principle of unjust enrichment does not apply to an agreement deliberately entered into by the parties
'however harsh the provisions of such contracts may seem in the light of subsequent happenings.'").

1 automatically to a finding that the benefit conferred was unjust. There must be more and Debtor
2 simply has not shown it on summary judgment.

3 Similarly, there is an issue of fact whether the subsequent lease back to Debtor was
4 unjust. Debtor does not claim that the lease terms were onerous or not at a fair market rate. As
5 Defendants have pointed out, Greystone in fact subsequently assumed the lease, which does
6 suggest that the lease terms in fact were fair. Debtor's primary argument seems to be that it was
7 forced by Defendant Meyers, as the controlling shareholder of board of director member, to lease
8 the property. Leasing real property to a company of which you are a majority shareholder or
9 member of the board of directors, however, is not an unusual business practice. And, the fact
10 that Defendants may have also made a profit off the lease back is not enough in and of itself.
11

12 For the same reason, it is not inherently unfair (on summary judgment) that Debtor, as
13 lessee, was responsible for paying the utilities and taxes on the property or for paying for the
14 various improvements to the property that were done for its own operations. It is not uncommon
15 for lessees to be responsible for their fair share of the utilities or taxes incurred on the property
16 through triple net provisions. Tenants are also often responsible for making the improvements
17 they need to operate their business at their own expense.
18

19 Last, based on the record provided, the Court does not agree that the release of the
20 shareholder loan was necessarily done without adequate consideration. There exists a question
21 of fact on this issue, as Defendants have provided sufficient evidence on summary judgment to
22 suggest that they took on additional financial obligations and liability by personally guaranteeing
23 the \$3.5 million worth of loans from Compass Bank and CIT.
24

25 **IV. Conclusion**

26 Because the Court denies Debtor summary judgment on its unjust enrichment claim, the
27
28

1 Court need not address whether a constructive trust or equitable lien will be imposed. These
2 issues will be addressed once a trial on the merits of the unjust enrichment claim is held. For the
3 same reason, Debtor's request for summary judgment on its declaratory judgment claim is
4 denied. Counsel for Defendants is to lodge a form of order consistent with this decision for the
5 Court's signature.
6

7 It is further ordered that the parties shall appear for a Rule 16(b) scheduling conference
8 on **August 17, 2005, at 11:00 a.m.**, United States Bankruptcy Court, 230 N. 1st Ave., Phoenix,
9 Arizona.

10 So ordered.

11
12 DATED: June 21, 2005

13 
14 CHARLES G. CASE II
15 United States Bankruptcy Judge

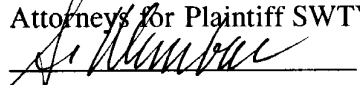
16 **COPY** of the foregoing mailed and/or via facsimile
17 this 21st day of June, 2005, to:

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